

No. 16497 ✓

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United States  
Court of Appeals  
for the Ninth Circuit

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MRS. THELMA AKANA HARRISON,

Appellant,

vs.

M. R. A., LTD., d/b/a TERRITORIAL  
COLLECTORS,

Appellee.

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Transcript of Record

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Appeal from the Supreme Court of the  
Territory of Hawaii

FILED

OCT 12 1959

PAUL P. O'BRIEN, CLERK



No. 16497

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Court of Appeals  
for the Ninth Circuit

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MRS. THELMA AKANA HARRISON,  
Appellant,  
vs.  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

R. G. DODGE,  
602 Trustco Bldg.,  
Honolulu, Hawaii,  
For Appellant.

ROBERT M. ROTHWELL,  
222 So. Queen St.,  
Honolulu, Hawaii,  
For Appellee.





In the Circuit Court of the First Judicial Circuit  
Territory of Hawaii

L. No. 23326

Assumpsit

M. R. A., LTD., d/b/a TERRITORIAL COLLEC-  
TORS,

Plaintiff,

vs.

MRS. THELMA AKANA HARRISON, aka MRS.  
THELMA M. AKANA HARRISON, For-  
merly Known as MRS. THELMA M. AKANA,  
aka MRS. DAVID Y. K. AKANA, and  
HAWAIIAN AMALGA PAVE, LTD.,

Defendants,

COOKE TRUST COMPANY, LIMITED, and  
WILLIAM'S MORTUARY, LIMITED,

Garnishees.

### COMPLAINT

To the Honorable the Presiding Judge of the Cir-  
cuit Court of the First Judicial Circuit, Terri-  
tory of Hawaii:

Comes now M. R. A., Ltd., d/b/a Territorial  
Collectors, plaintiff above-named, and for cause of  
action alleges as follows:

#### I.

That plaintiff is a corporation duly organized  
and existing under the laws of the Territory of  
Hawaii, and that defendant, Mrs. Thelma Akana

Harrison, aka Mrs. Thelma M. Akana Harrison, formerly known as Mrs. Thelma M. Akana, aka Mrs. David Y. K. Akana, is a resident of Honolulu, Hawaii, and that defendant, Hawaiian Amalga Pave, Limited, is located in Honolulu, Hawaii.

## II.

That at Honolulu, T. H., on the 1st day of June, 1951, the above-named defendants made, executed and delivered to Benjamin Fukunaga a certain promissory note in writing, in words and figures as follows, to wit:

\$10,000.00

Honolulu, T. H.

June 1, 1951.

For value received, on or before the 31st day of August, 1952, the undersigned, Hawaiian Amalga-Pave, Limited, a Hawaiian corporation, and Thelma Akana Harrison, jointly and severally, promise to pay to the order of Benjamin Fukunaga, the sum of Ten Thousand Dollars (\$10,000.00), with interest thereon from date at the rate of five (5) per cent per annum, provided, however, such interest shall be waived in case this note is paid on or before the 31st day of August, 1952, as provided herein.

In case suit is brought to collect this note, or any part thereof, in undersigned, jointly and severally, promise to pay all costs of collection, including a reasonable sum as and for attorney's fee.

HAWAIIAN AMALGA-  
PAVE, LIMITED,

A Hawaiian Corporation;

By /s/ THELMA AKANA HARRISON,  
Its President, and

/s/ DAVID Q. GILLETTE,  
Its Treasurer.

THELMA AKANA HARRISON,  
THELMA AKANA HARRISON.

and thereby promised to pay to the order of said Benjamin Fukunaga the sum of \$10,000.00, as in said promissory note specified.

### III.

That thereafter and prior to the bringing of this suit, said Benjamin Fukunaga for a good and valuable consideration, and by indorsement on the back of said note, duly sold and transferred said note and the money due thereon to plaintiff herein who is now the owner and holder thereof. That thereafter, and prior to the bringing of this suit, said plaintiff demanded of said defendants the payment of the sum due on said note, but defendants failed and neglected to pay the same or any part thereof; that defendants have failed, neglected and refused to pay to the damage of the plaintiff the sum of \$10,000.00 and interest thereon from August 31, 1952.

### IV.

Plaintiff further believes that Cooke Trust Company, Limited, and William's Mortuary, Limited, are the attorneys, agents, factors, trustees, employ-

ers or debtors of the above-named defendants and that said garnishees have in their hands, goods or effects belonging to the said defendants, or that said garnishees are the persons from whom debts are due to said defendants, or that said garnishees are the persons from whom the said defendants are in receipt of salaries, stipends, commissions, wages, annuities or income or portions of net income under a trust.

Wherefore, plaintiff prays for judgment against defendants in and for the sum of \$10,000.00 together with interest thereon from the 31st day of August, 1952, costs and attorney's fees as provided and prays that process in due form of law issue out of this court citing and summoning defendants to appear and answer this complaint.

Plaintiff requests the court issuing summons herein to insert therein a direction to the officer serving the same to leave a true and attested copy thereof, and of this complaint with the above-named garnishees or at their usual places of abode, and to summon said garnishees to appear at the time and place in the summons appointed and then and there to disclose on oath as provided by law whether they have, or at the time said copies were served, had any of the goods, or effects of the said defendants in their hands, and if so, the nature, amount and value thereof; or whether they are, or at the time of service were indebted to the said defendants and, if so, the nature and amount of said debts; or whether the said defendants are or

at the time of service were in receipt from them of any salaries, stipends, commissions, wages, annuities or net income or portion of net income under a trust and, if so, the amounts or rates thereof.

Dated: Honolulu, T. H., this 31st day of Dec., 1953.

M. R. A., LTD., d/b/a TERRITORIAL COLLECTORS,  
Plaintiff,

By PETER A. LEE &  
Y. FUKUSHIMA,

By /s/ GEARON T. HAMMOND,  
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed February 15, 1954.

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[Title of Circuit Court and Cause.]

### GENERAL DENIAL

Comes now Thelma Akana Harrison, one of the defendants above named, by her attorneys, Heen, Kai, Dodge & Lum, and for answer to the complaint filed herein, denies each and every, all and singular, the allegations contained therein and hereby gives notice that she will, as a complete, separate and distinct defense thereto, rely upon the fact that there was no consideration for the alleged promise as therein set forth.



Dated: Honolulu, T. H., this 19th day of April, 1954.

THELMA AKANA HARRISON,

Defendant, by

HEEN, KAI, DODGE & LUM,

By /s/ R. G. DODGE,

Her Attorneys.

Receipt of copy acknowledged.

[Endorsed]: Filed April 19, 1954.

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In the Circuit Court of the First Judicial Circuit  
Territory of Hawaii

L. No. 23326

M. R. A., LTD., d/b/a TERRITORIAL COLLECTORS,

Plaintiff,

vs.

MRS. THELMA AKANA HARRISON, aka MRS.  
THELMA M. AKANA HARRISON, Formerly Known as MRS. THELMA M. AKANA,  
aka MRS. DAVID Y. K. AKANA, and  
HAWAIIAN AMALGA PAVE, LTD.,

Defendants,

COOKE TRUST COMPANY, LIMITED, and  
WILLIAM'S MORTUARY, LIMITED,

Garnishees.

### JUDGMENT

The issues in the above-entitled action having been regularly brought on for trial before the Honor-

able Albert M. Felix, without a jury, and the evidence adduced by the parties having been heard, and the Court having entered its Decision, Findings of Fact and Conclusions of Law, directing judgment as hereinafter provided, it is hereby

Ordered, Adjudged and Decreed that Plaintiff recover of Defendants the sum of \$10,000.00, with interest at the rate of 5% per annum from the 1st day of June, 1951, costs in the sum of \$90.25 and attorneys' fees in the sum of \$1,000.00.

Dated at Honolulu, T. H., this 7th day of March, A.D. 1957.

[Seal]      /s/ P. J. O'WILLIAM, JR.,  
Clerk.

Approved:

/s/ A. M. FELIX,  
Judge of the Above-Entitled  
Court.

[Endorsed]: Filed March 7, 1957.

In the Supreme Court of the Territory of Hawaii,  
October Term, 1958

M. R. A., LTD., d/b/a TERRITORIAL COLLEC-  
TORS,

vs.

MRS. THELMA AKANA HARRISON, aka MRS.  
THELMA M. AKANA HARRISON, For-  
merly Known as MRS. THELMA AKANA,  
aka MRS. DAVID Y. K. AKANA, and  
HAWAIIAN AMALGA PAVE, LTD., and  
COOKE TRUST COMPANY, LIMITED, and  
WILLIAM'S MORTUARY, LIMITED,

Garnishees.

No. 4046

Appeal From Circuit Court, First Circuit,  
Hon. Albert M. Felix, Judge

Argued January 7, 1959.

Decided January 15, 1959.

Rice, C. J., Stainback, J., and Circuit Judge Dyer  
in Place of Marumoto, J., Disqualified.

Bills and Notes—accommodation maker—liability.

One who signed a firm's note as an accommoda-  
tion maker is primarily liable on the note and abso-  
lutely required to pay, irrespective of consideration  
to such maker. Consideration received by the co-  
maker from the payee is sufficient.

## OPINION OF THE COURT

By Rice, C. J.

Thelma Akana Harrison, defendant-appellant  
above named, has appealed to this supreme court



from a final judgment adverse to her in the third division of the circuit court, first circuit, Territory of Hawaii, which was entered and filed on March 7, 1957, pursuant to a decision, findings of fact and conclusions of law made and filed on said date by the judge of the trial court, after a jury-waived trial.

The action was upon a promissory note, in words and figures, hereinafter quoted.

“\$10,000.00

“Honolulu, T. H.

“June 1, 1951

“For Value Received, on or before the 31st day of August, 1952, the undersigned, Hawaiian Amalga-Pave, Limited, a Hawaiian corporation, and Thelma Akana Harrison, jointly and severally, promise to pay to the order of Benjamin Fukunaga, the sum of Ten Thousand Dollars (\$10,000.00), with interest thereon from date at the rate of five (5) per cent per annum, provided, however, such interest shall be waived in case this note is paid on or before the 31st day of August, 1952, as provided herein.

“In case suit is brought to collect this note, or any part thereof, the undersigned, jointly and severally, promise to pay all costs of collection, including a reasonable sum as and for attorney’s fee.

“HAWAIIAN AMALGA-  
PAVE, LIMITED,

“A Hawaiian Corporation,

“By /s/ THELMA AKANA HARRISON,

“Its President, and

“/s/ DAVID Q. GILLETTE,

“Its Treasurer.

“/s/ THELMA AKANA HARRISON,

“THELMA AKANA HARRISON”

The judgment of the trial court is: “\* \* \* that Plaintiff recover of Defendants the sum of \$10,000.00, with interest at the rate of 5% per annum from the 1st day of June, 1951, costs in the sum of \$90.25 and attorneys’ fee in the sum of \$1,000.00.”

To the complaint in the lower court the defendant Thelma Akana Harrison had filed a general denial and had also therein given notice that she would, “\* \* \* as a complete, separate and distinct defense thereto, rely upon the fact that there was no consideration for the alleged promise as therein set forth.” For failure to plead or otherwise defend as required by law, a default was entered against her co-defendant, the Hawaiian Amalgamated Pave, Ltd.

By stipulation entered into on behalf of the plaintiff, the defendant Thelma Akana Harrison, and Cooke Trust Company, Limited, one of the garnishees, it was provided, “\* \* \* that in lieu of holding 3,353 shares of Nuuanu Funeral Parlor, Limited, and 4 shares of Williams Mortuary, Limited, mentioned in the Answer of said garnishee, said shares may (could) be sold and the sum of \$14,000.00 from the proceeds of sale retained by said garnishee, subject to further order of the Court \* \* \*.” It was accordingly so ordered by

the judge of the circuit court, then having jurisdiction of the matter.

In connection with the appeal in this supreme court, briefs were submitted on behalf of Thelma Akana Harrison, defendant-appellant, and on behalf of the plaintiff-appellee, and subsequently, on January 7, 1959, oral argument was had.

That Thelma Akana Harrison signed the note as co-maker is a conceded fact, but it has been contended by her and on her behalf that she signed it as an "accommodation" co-maker; that no consideration was received by her from Benjamin Fukunaga, to whose order the note was payable; and that, therefore, as the note was transferred for collection after maturity and default by the other co-maker, she is not liable for payment of the note.

However, it has been admitted on behalf of Thelma Akana Harrison that there was consideration given by Benjamin Fukunaga to the other co-maker of the note, Hawaiian Amalga Pave, Limited.

Since the oral argument of the appeal in this case was had, this supreme court has received a copy of an advance sheet of the opinion of the United States Court of Appeals for the Ninth Circuit, in the case of James R. Yost, appellant, vs. Alberta G. Morrow, appellee, number 15,998, January 2, 1959, which we deem conclusive of the case before us.

In the cited case the note was as hereinafter quoted and set forth.

“\$7,300.00

“October 17, 1955.

“On or before April 15, 1956, after date, for value received, we promise to pay to the order of James R. Yost at the First National Bank of Portland at Nyssa, Oregon, Seven Thousand Three Hundred and 00/100 Dollars in lawful money of the United States of America, with interest thereon in like lawful money at the rate of 6 per cent per annum, from date until paid. Interest to be paid at maturity and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum, in like lawful money, as the Court may adjudge reasonable, for attorneys’ fees to be allowed in said suit or action.

“C. A. BUTCHER,

“ALBERTA G. MORROW.”

At the trial it was shown that Mrs. Morrow was the mother-in-law of Butcher, and that he lived on and managed a ranch owned by Mrs. Morrow. The latter testified that she signed the note, but that she did not receive any money from Yost. There was neither a showing nor an allegation that Mrs. Mor-

row's signature on the note was fraudulently procured.

“It further appeared at the trial that Butcher received Yost's checks in the amount of the note, and that the checks were made out to, and endorsed by, Butcher without Mrs. Morrow's signature appearing thereon.”

The note was executed in Oregon, and payment thereon was to be made in Oregon. The United States Court of Appeals for the Ninth Circuit held:

“It is settled law that under Section 24 of the Uniform Negotiable Instruments Act, adopted by Oregon in 1899, O.C.L.A. §§ 69-101 to 69-1102 (now, Oregon revised Statutes §§ 71.001 to 71.195), consideration moving to one joint maker of an instrument is sufficient to bind the other joint maker or makers. In the instant case, it is clear that Mrs. Morrow signed as an accommodation maker for her son-in-law, C. A. Butcher. It is also settled law that an accommodation maker is bound if consideration passes to the principal maker, and that the accommodation maker has primary, not secondary, liability. \* \* \*.”

“In the instant case (Yost vs. Morrow), one co-maker, Butcher, received full consideration from Appellant. Mrs. Morrow, who was an accommodation maker, is bound on this note by reason of this consideration. The fact that (she) did not personally receive any money from Yost does not relieve her of liability on this promissory note.”



Adopted by Oregon in 1899, provisions of the uniform negotiable instruments act were adopted by the Territory of Hawaii in 1907 (Act 89, S. L. H. 1907) and have since been law in this Territory, so that what has been said in the opinion of the United States Court of Appeals for the Ninth Circuit, in *Yost vs. Morrow*, *supra*, as to the settled law in Oregon is likewise applicable to Hawaii. See Chapter 197, R. L. H. 1955, and like provisions in Chapter 173, R. L. H. 1945. The language of Section 197-24, R. L. H. 1955, is identical with that of Section 24 of the uniform negotiable instruments act, referred to in the opinion in said case of *Yost vs. Morrow*.

Affirmed.

/s/ PHILIP L. RICE.

/s/ INGRAM McLAIN BENT.

/s/ JOHN P. DYER.

ROBERT G. DODGE,

(HEEN, KAI, DODGE & LUM on the briefs)

For Mrs. Thelma Akana Harrison, Defendant-Appellant, and Williams Mortuary, Ltd., Garnishee.

ROBERT M. ROTHWELL,

(Also on the brief)

For Plaintiff-Appellee.

[Endorsed]: Filed January 15, 1959.

In the Supreme Court of the Territory of Hawaii  
October Term, 1958

No. 4046

[Title of Cause.]

## PETITION FOR REHEARING

Thelma Akana Harrison, defendant-Appellant, being aggrieved by the opinion of this court filed on January 15, 1959, affirming the judgment of the court below, presents this petition for rehearing and reconsideration of the appeal heretofore filed herein by her and, as grounds therefor, respectfully states as follows:

### I.

The opinion of this court states, in part:

Since the oral argument of the appeal in this case was had, this supreme court has received a copy of an advance sheet of the opinion of the United States Court of Appeals for the Ninth Circuit, in the case of James R. Yost, appellant, vs. Alberta G. Morrow, appellee, number 15,998, January 2, 1959, which we deem conclusive of the case before us. (Op. p. 3.) (Emphasis added.)

Yost vs. Morrow is not in point and is not conclusive of the case before this court.

Following receipt of this court's opinion, defendant-appellant obtained a copy of the briefs filed in Yost vs. Morrow in the Court of Appeals. These briefs, a single copy of the appellant's Opening

Brief and a single copy of the appellee's brief, have been filed with this court as a part of this Petition.

In *Yost vs. Morrow*, the appellant was Yost, who was the payee of the note in question. Morrow was the accommodation party who had received no consideration for her promise. The following appears in the appellant's Statement of the Case (Opening Br. p. 4).

Further the Appellant testified that Mrs. Morrow was never talked to at all about the contract between Butcher (the maker) and the appellant and that all that the Appellant did was to insist that she countersigned on the note before he made the loan. (R. 60 and 61.)

The Defendant Butcher further testified that the Appellant told him that before Butcher would get his loan the Appellant had to have the note and mortgage and that he had to have Butcher's mother-in-law, Mrs. Alberta G. Morrow, sign the note. (R. 86.)

The appellee, who was successful in the trial court, defended on the ground that she was not asked to sign the mortgage and note for the purpose of lending her credit to Butcher but rather because she owned the land upon which the security for the mortgage was stored. (Op. Br. p 4; Appellee's Br. p. 3.)

The court of appeals correctly held Mrs. Morrow liable on the note for the very obvious reason that the very purpose of the accommodation—the lend-



ing of her credit to the maker and the subsequent loan made by the payee—was accomplished.

As this court well knows, the facts in the appeal before it are not in dispute that the note was given to record previous advances made by the payee to the corporate maker with no reliance whatever on the credit of the appellant, and that since the execution of the note no other person has given any value for it. These facts are set forth, by reference to the Transcript in appellant's Opening Brief pages 7-12.

Appellant restates her argument: Where all witnesses testified that the consideration for the note was the past advances made to the corporation by the payee, this court cannot manufacture or create new evidence that there was also other consideration for the note.

## II.

The authorities which set forth the law applicable to accommodation parties where no value has been given for the instrument in reliance upon the credit of the accommodation party are set forth in Appellant's Opening Brief at pages 12-15.

Added authority was cited on oral argument:

Carr vs. Wainwright, 43 F2d 507, 5 Univ. of Cincinnati Law Review 115.

Brannon Negotiable Instruments, (6th Ed)  
p. 429.

Wherefore, your petitioner respectfully prays that this Petition for Rehearing be granted, and

specially prays that this court allow oral argument on the Petition (as provided by Rule 5 of the Rules of the Supreme Court) and that the opinion heretofore entered herein by this court be set aside and a new opinion consistent with the facts and the law be thereupon entered.

Dated: Honolulu, T. H., this 26th day of January, 1959.

/s/ R. G. DODGE,  
Attorney for Defendants-  
Appellants.

I certify that the foregoing Petition is presented in good faith, is well founded in law and is not for purposes of delay.

/s/ R. G. DODGE.

Receipt of copy acknowledged.

[Endorsed]: Filed January 26, 1959.

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In the Supreme Court of the Territory of Hawaii,  
October Term, 1958

No. 4046

[Title of Cause.]

### PETITION FOR REHEARING

Filed January 26, 1959.

Decided April 6, 1959.

Rice, C. J., Stainback, J., and Circuit Judge Dyer  
in Place of Marumoto, J., Disqualified.

Per Curiam.

The petition for rehearing filed herein by Thelma Akana Harrison, defendant-appellant, is denied without argument.

/s/ PHILIP L. RICE.

/s/ INGRAM McLAIN BENT.

/s/ JOHN N. DYER.

ROBERT G. DODGE,

(HEEN, KAI, DODGE & LUM)

For Mrs. Thelma Akana Harrison, Defendant-Appellant, for the Petition.

[Endorsed]: Filed April 6, 1959.

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In the Supreme Court of the Territory of Hawaii

October Term, 1958

No. 4046

M. R. A., LTD., d/b/a TERRITORIAL COLLECTORS,

Plaintiff-Appellee,

vs.

MRS. THELMA AKANA HARRISON, et al.,

Defendants-Appellants,

COOKE TRUST COMPANY, LIMITED, and  
WILLIAMS, MORTUARY, LIMITED,

Garnishees.

### DECREE ON APPEAL

Pursuant to the opinion of this court rendered in the above cause on January 15, 1959, and the

order of this court denying a rehearing thereof entered April 6, 1959,

It Is Hereby Ordered, Adjudged and Decreed that the Judgment of the court below in the above cause be and hereby is affirmed.

Dated: Honolulu, Hawaii, May 5, 1959.

By the Court:

[Seal]      /s/ LEOTI V. KRONE,  
Clerk.

Approved:

/s/ PHILIP L. RICE,  
Justice.

[Endorsed]: Filed May 5, 1959.

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In the Supreme Court of the Territory of Hawaii  
October Term, 1958

No. 4046

[Title of Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Mrs. Thelma Akana Harrison, one of the Defendants-Appellants above named, appeals to the Circuit Court of Appeals for the Ninth Circuit from the Judgment entered in this action May 5, 1959.

Dated: Honolulu, Hawaii, May 5, 1959.

/s/ R. G. DODGE,

Attorney for Mrs. Thelma

Akana Harrison.

HEEN, KAI & DODGE,

Of Counsel.

[Endorsed]: Filed May 5, 1959.

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In the Circuit Court of the First Judicial Circuit  
Territory of Hawaii

Law No. 23326

M. R. A. LTD., d/b/a TERRITORIAL  
COLLECTORS,

Plaintiff,

vs.

MRS. THELMA AKANA HARRISON, aka MRS.  
THELMA M. AKANA HARRISON, For-  
merly Known as MRS. THELMA M. AKANA,  
aka MRS. DAVID Y. K. AKANA, and  
HAWAIIAN AMALGA PAVE, LTD.,

Defendants,

COOKE TRUST COMPANY, LIMITED, and  
WILLIAMS MORTUARY, LIMITED,

Garnishees.

### TRANSCRIPT

Of proceedings had and testimony adduced before  
Honorable Albert M. Felix, Third Judge of the

above-entitled Court on February 12, February 27 and March 1, 1957.

Appearances:

GEORGE NAKAMURA, ESQ., and  
Y. FUKUSHIMA, ESQ.,  
Counsel for Plaintiff.

ROBERT G. DODGE, ESQ.,  
Counsel for Defendant Mrs. Thelma Akana  
Harrison.

\* \* \*

BENJAMIN T. FUKUNAGA

called as an adverse witness by the defendant, being  
first duly sworn, testified as follows:

Direct Examination

By Mr. Dodge:

\* \* \*

Q. Now, you treated those as loans by yourself to the corporation, did you not, those additional expenditures that you made?

A. You could call it that.

Q. So at the time you wanted to get out you considered that the corporation owed you quite a bit of money from money that you had personally paid in promoting the business of the corporation, is that correct? A. Yes, I believe so.

Q. Had you ever evidenced those advances in any way by a corporate note prior to June 1st, 1951? A. No.

\* \* \*



DAVID O. GILLETTE

called as a witness for and on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Dodge:

\* \* \*

The Court: Was there any mention about a note?

The Witness: The note of the corporation, yes, because they were interested in what they thought she could pay them.

The Court: The note was also discussed?

The Witness: Yes, the corporate note.

The Court: Was the note discussed?

The Witness: Yes.

The Court: Was the amount of the note discussed?

The Witness: As I recall, the figure was set at \$10,000. There wasn't any negotiation. They just said they would like a note from the corporation for \$10,000.

The Court: What for?

The Witness: Because Ben had loaned the corporation considerable money.

\* \* \*

Q. Although you did not sign that agreement, Mr. Gillette, you did execute the note on behalf of the corporation, would you tell the Court the reason for doing so.

The Court: What note is this?

(Testimony of David O. Gillette.)

Mr. Dodge: That is the note that is being sued on.

A. Well, I knew that Mr. Fukunaga had advanced sums in excess of that amount to the corporation so I executed a note in that amount.

Q. Were you then an officer or director?

A. Well, I——

The Court: Wait. Will you explain what you mean that these were sums advanced to the corporation, this was not for the purchase of the stock?

The Witness: No, sir.

The Court: For sums advanced?

The Witness: Mr. Fukunaga had loaned the corporation monies from time to time, which was far in excess of that amount.

The Court: And the company felt that they owed him this money?

The Witness: Well, the company actually owed him a lot more money, but they thought it would be easier to sell the company if it didn't owe so much so apparently they came to some decision and made it \$10,000.

The Court: So when you signed this note it was for sums advanced?

The Witness: Yes, sir.

The Court: And Hawaiian Amalga Pave Company was to repay Mr. Fukunaga for sums advanced in the amount of \$10,000?

The Witness: Yes, sir.

The Court: And this had nothing to do with the purchase of the stock?



(Testimony of David O. Gillette.)

The Witness: No, sir.

\* \* \*

Mr. Nakamura: I beg to differ slightly with the defendant. If the Court will recall, the plaintiff's proof was very brief, based merely on stipulations and the admission of the note in evidence. The note shows on its face, and on the face of the agreement, that it is a note signed by the corporation with Thelma Akana Harrison as accommodation co-maker. Now, the question of whether there is a sale involved, or not a sale, or an agency, is not part of the plaintiff's case. That is something that has been brought up by the defendant. Now we contend, your Honor, that surely, even under the negotiable instruments law, and whatever is derived from this agreement and from the testimony, that insofar as the corporation is concerned there was more than sufficient consideration for the execution of the note, in that the note was executed in extinguishment of the existing debts which had existed between the corporation and Ben Fukunaga, the advances that he had made on behalf of the corporation, and antecedent debts under our law is valuable consideration, and, therefore, Ben Fukunaga is without doubt a holder for value. Now, insofar as Thelma Akana Harrison is concerned, I think Mr. Dodge has been contending all along also, he has been showing that Thelma Akana Harrison is an accommodation co-maker. Am I right, Mr. Dodge?

Mr. Dodge: Certainly.

Mr. Nakamura: And under the law, your Honor, even under the negotiable instruments law there need not be any consideration moving directly to an accommodation co-maker.

The Court: Mr. Dodge doesn't agree with you.

Mr. Dodge: I don't agree with him.

The Court: That is a question of law.

\* \* \*

ASSOCIATE JUSTICE MASAJI MARUMOTO called as a witness, on rebuttal, for and on behalf of the plaintiff, being first duly sworn, testified as follows:

\* \* \*

### Cross-Examination

By Mr. Dodge:

\* \* \*

Q. Now, this corporation note then represented, did it not, the amount that the corporation was obligated to Mr. Fukunaga?

A. That is in theory, that note was, that it represented the corporate obligation to Mr. Fukunaga.

Q. And that corporate obligation is the sum that you have testified, the corporation obligation of \$8,890?

The Court: What about the stock?

Q. Isn't that correct?

A. Plus the loss, whatever there is, on the Hawaiian Amalga Pave claim against Standard Steel.

(Testimony of Masaji Marumoto.)

The Court: You haven't answered this question, what about the stock?

Mr. Dodge: Your Honor, may I please present this in an orderly fashion? It is necessary for me to do it to present it. This is a very confusing situation——

The Court: There is nothing confusing about this.

Mr. Dodge: Apparently the Court appears to be confused on it, your Honor.

The Court: You are trying to say that is the only corporate obligation——

Mr. Dodge: I am not trying to say anything. I am just trying to find out from Mr. Marumoto, who drew the agreement, what the agreement does.

Q. Isn't it correct that the only corporate obligation on June 1st to Mr. Fukunaga was the sum of \$8,890?

A. Let me see, the National Amalga Pave of \$7,090, and the lease—I am thinking of Standard Steel Corporation.

Q. That was treated separately, wasn't it?

A. It was treated separately, yes.

Q. By an assignment?

A. That is right, but there would have been a loss incurred because Standard Steel I think was willing to refund only \$2,300, or some such sum, and so there would have been an enormous sum of loss there which Mr. Fukunaga expended for Hawaiian Amalga Pave.

(Testimony of Masaji Marumoto.)

Q. That was a loss, was it not, that he was well aware of even in his letter of May 9?

A. Beg your pardon.

Q. He was aware of that loss in his letter of May 9? A. Still there was that loss, yes.

Q. He acknowledged the fact that he had paid that amount and he knew that he would only be able to recover a certain amount of it?

A. Still that would be a claim against the corporation.

Q. All right. That claim was all included in this assignment of whatever rights he had?

A. All right. Now, he had put out \$9,000 to Standard Steel. Now, according to this agreement, at that time there was an offer by Standard Steel to refund Mr. Fukunaga the sum of \$3,423.00, and then also an agreement to give a credit of \$2,500 if an Amalga Pave unit was later ordered. That adds up to the sum of \$5,923 and that would still leave Mr. Benjamin Fukunaga \$3,077 out of pocket, which brings it up to beyond \$10,000.

Q. About eleven thousand, possibly twelve thousand? A. That is right.

Q. Those were the only corporate obligations that were—— A. I suppose so.

The Court: All right. Let's stop right there. That was the only corporate obligation, Judge?

The Witness: I think so.

The Court: How about the stock, isn't that a corporate obligation?

(Testimony of Masaji Marumoto.)

The Witness: That is not a corporate obligation. That is an individual obligation of Thelma Akana.

The Court: How about the stock that is held by the individual stockholders, is that a corporation obligation?

The Witness: That is not a corporate obligation.

The Court: What is it?

The Witness: Because the agreement was——

The Court: What is it? Let's forget about this agreement. What is it?

The Witness: It is an obligation of Thelma Akana.

The Court: Does the corporation owe the stockholders the value of the stock?

The Witness: The corporation does not owe the stockholders—let me see now—let me see what your question would be, your Honor.

The Court: You said that the only corporation obligation is this \$8,890.

The Witness: Plus the \$3,077.

The Court: That is what I am asking you. Is there any other corporate obligation? What about the stock?

The Witness: The stock is an obligation of Thelma Akana because Thelma Akana——

The Court: Let's forget about Thelma Akana. Let's talk about this corporation.

The Witness: The corporation did not agree to repurchase the shares, so the obligation of the corporation is not on the stock.

Q. (By Mr. Dodge): As a matter of fact, Mr.



(Testimony of Masaji Marumoto.)

Marumoto, the corporation could not have purchased these shares of stock——

A. That is correct.

Q. ——under the laws of the Territory?

A. That is correct.

\* \* \*

Q. (By Mr. Dodge): You stated in your direct testimony, Mr. Marumoto, that it was your understanding of this agreement of June 1, that Ben would cancel the obligation the corporation had to him other than those taken up in the note, and we have already identified what that other obligation might have been, \$1,967.

A. \$11,967, Mr. Dodge.

Q. You had a corporation note for that?

A. Of which \$10,000 was represented by this new corporate note.

Q. So he forgave the corporation a maximum of \$1,967 of its debts?

A. All right.

Q. But you also stated that Mrs. Harrison also was forgiven other claims that Mr. Fukunaga had against her personally, do you recall that testimony?

A. Well, if there was any, sure.

Q. Well, you stated——

A. Well, the \$10,000 was the complete settlement.

Q. ——“As far as I know the nature of the agreement was that she was to pay \$10,000 on August 31, 1952, and that whatever other claim that Mr. Benjamin Fukunaga had against her, or against Hawaiian Amalga-Pave, would be waived.”

A. That's right.

(Testimony of Masaji Marumoto.)

Q. Were you aware of any claim that Mr. Fukunaga had against her on June 1st, 1951?

A. I am not aware, no.

Q. And this \$1,967 is the only other claim that you can think of that the corporation had against Ben, or that Ben had against the corporation?

A. That is he waived the \$11,967—

Q. And got a corporation note?

A. Yes, for that \$10,000.

Q. Do you know whether or not Mr. Peter Fukunaga had any claim against Mrs. Harrison?

A. No.

Q. Do you know whether or not he claimed that he did?           A. I don't think he did.

\* \* \*

[Endorsed]: Filed September 25, 1957.

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## DEFENDANT'S EXHIBIT A

This Agreement made and entered into this 1st day of June, 1951, by and between Thelma Akana Harrison, party of the first part, hereinafter called Harrison, and Benjamin T. Fukunaga, party of the second part, hereinafter called Fukunaga,

Witnesseth:

1. That in consideration of the sum of \$1.00 to him paid by Harrison, the receipt of which is

hereby acknowledged, and the agreements of Harrison hereinafter contained, Fukunaga hereby agrees with Harrison as follows:

(a) That he will assign and transfer to Harrison 7,500 shares of the capital stock of Hawaiian Amalga-Pave, Limited, of the par value of \$10.00 per share;

(b) That he will pay all telephone and radio-gram bills incurred on behalf of Hawaiian Amalga-Pave, Limited, by him since January 15, 1951, to the date hereof;

(c) That he will indemnify Hawaiian Amalga-Pave, Limited, and save it harmless from any and all claims on account of the moneys obtained by him in connection with the proposed sale by him of the shares of the capital stock of Hawaiian Amalga-Pave, Limited, and in this connection he will make, within a reasonable time from date, all arrangements for the repayment of all such sums obtained by him; and

(d) That upon the delivery to him of:

(i) Promissory note made by Hawaiian Amalga-Pave, Limited, as maker, and Harrison as accommodation co-maker, in the sum of \$10,000.00, as hereinafter provided;

(ii) Assignment of all rights of Hawaiian Amalga-Pave, Limited, against Standard Steel Corporation in connection with the deposit in the sum



of \$9,000.00 made on a purchase order for an amalga-pave plant, as hereinafter provided; and

(iii) Check covering the credit balance in the account of Hawaiian Amalga-Pave, Limited, with the Liberty Bank of Honolulu,

he will waive and cancel any and all claims that he has against Hawaiian Amalga-Pave, Limited, except the claim on the promissory note hereinabove mentioned, and will also cancel the agreement with Harrison, dated October 17, 1950, including the option given to Fukunaga by Harrison to purchase the shares of the capital stock of National Amalga-Pave, Inc., owned by Harrison, as provided in paragraph 8 of said agreement, and the option given to Fukunaga by Harrison to obtain a sub-license from National Amalga-Pave, Inc., to use and practice the invention patented under United States Patent No. 2,220,670 in Japan, as provided in paragraph 9 of said agreement.

2. In consideration of the foregoing agreement of Fukunaga, Harrison hereby agrees with Fukunaga as follows:

(a) That upon the assignment and transfer by Fukunaga to her of 7,500 shares of the capital stock of Hawaiian Amalga-Pave, Limited, of the par value of \$10.00 per share, she will cause Hawaiian Amalga-Pave, Limited, to:

(i) Execute and deliver to Fukunaga a promissory note for \$10,000.00, payable on or before

August 31, 1952, providing for interest from date at the rate of 5% per annum and waiver of interest in case of payment on or before August 31, 1952, and also providing for payment of all costs of collection including a reasonable attorney's fee in case of default, and Harrison will join in the execution of said promissory note as accommodation co-maker;

(ii) Accept the offer made by Standard Steel Corporation, in connection with the deposit in the sum of \$9,000.00 made on a purchase order for an amalga-pave plant, to refund the sum of \$3,423.00 immediately and to allow a credit of \$2,500.00 on the purchase of an amalga-pave plant within six months from May 11, 1951, as contained in its letter of said date, and to assign to Fukunaga all rights to said refund of \$3,423.00 and credit of \$2,500.00; and

(iii) Issue a check covering the credit balance in the account of Hawaiian Amalga-Pave, Limited, with The Liberty Bank of Honolulu.

(b) That in the event that Harrison shall sell said 7,500 shares of the capital stock of Hawaiian Amalga-Pave, Limited, prior to August 31, 1952, she will specify as a condition of such sale that the purchaser of such shares shall loan the sum of \$10,000.00 to Hawaiian Amalga-Pave, Limited, and cause Hawaiian Amalga-Pave, Limited, to pay the above-described promissory note immediately upon receipt of such loan.

In Witness Whereof, the parties hereto have executed this agreement the day and year first above written.

/s/ THELMA AKANA HARRISON.

/s/ BENJAMIN T. FUKUNAGA.

[Endorsed]: Filed September 25, 1957.

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DEFENDANT'S EXHIBIT E

Honolulu, T. H.

May 9, 1951

Mrs. Thelma Akana Harrison

Honolulu, T. H.

Dear Mrs. Harrison:

In connection with Hawaiian Amalga-Pave, Limited, I have thus far paid out the sum of \$29,-240.42, exclusive of sundry promotional expenses, as follows:

Paid to you, October 17, 1950.....	\$10,000.00
Paid to National Amalga-Pave, Inc., according to your direction, January 18, 1951 .....	7,090.92
Paid to you, October 17, 1950, for the shares of David Gillette, Gersham Martin and Raymond Akana.....	1,350.00
Paid to Chester Clarke, as rental, June, 1950. to February, 1951.....	1,800.00

Down payment to Standard Steel Corporation for Amalga-Pave unit.....	9,000.00
	<hr/>
	\$29,240.92

You have delivered to me two stock certificates of Hawaiian Amalga-Pave, Limited, for 30,000 shares of its common stock, one being for 16,500 shares previously owned by you and the other being for 13,500 shares previously owned by David Gillette, Gersham Martin and Raymond Akana.

I have decided to dispose of any interest that I may have in Hawaiian Amalga-Pave, Limited, and submit to you the following proposition:

1. I will endorse and deliver to you the certificates for 30,000 shares of common stock of Hawaiian Amalga-Pave, Limited, which are now in my name.

2. In consideration of the delivery of the stock certificates to you:

- (a) You will execute and deliver to me your promissory note for \$10,500.00, payable on or before October 31, 1951. Your promissory note to me dated October 17, 1950, will be returned to you, marked "cancelled." That note carried interest at the rate of 5% from October 17, 1950. In case you pay the new note on or before October 31, 1951, I will deduct the sum of \$500.00 and you need pay me the sum of \$10,000.00 only.

- (b) You will cause Hawaiian Amalga-Pave, Limited, to assign to me all of its claim against

Standard Steel Corporation for the return of the \$9,000.00 deposited in connection with the order for an amalga-pave unit ordered in the name of Hawaiian Amalga-Pave, Limited. I will negotiate with Standard Steel Corporation for the recovery of such deposit, or any part thereof.

3. With reference to the following:

\$1,350.00 paid for the shares of David Gillette, Gersham Martin and Raymond Akana;

\$1,800.00 paid to Chester Clarke as rental for June, 1950, to February, 1951; and

\$7,090.92 paid to National Amalga-Pave, Inc., at your request,

I request that you reimburse said sums to me in case you sell the shares of Hawaiian Amalga-Pave, Limited, for a sum in excess of \$10,000.00. For instance, if you sell the shares for \$20,240.92, you will reimburse me \$10,240.22, being the total of the three items mentioned above. But if you sell the shares for less than \$20,240.92, then you will reimburse me any sum that you obtain in excess of \$10,000.00. On these items, I will depend solely on your good faith to enable me to recover as much of my cash outlay as possible. Also, I request that you immediately cause to be withdrawn from The Liberty Bank of Honolulu the sum of \$423.55 in the account of Hawaiian Amalga-Pave, Limited, and apply the same in partial reimbursement of the items mentioned herein. In case you do not sell the shares but retain them, then you shall reimburse all of said



sums to me when Hawaiian Amalga-Pave, Limited, starts the manufacture of amalga-pave.

Also with reference to the deposit of \$2,600.00 for the amalga-pave unit, if you know of any person who is interested in taking over the contract for the purchase of the unit so that my loss will be minimized, I request you refer any such person to me. Here again, I request no more than your good faith in helping me to minimize my loss.

Yours very truly,

/s/ BENJAMIN FUKUNAGA.

[Endorsed]: Filed September 25, 1957.

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DEFENDANT'S EXHIBIT F

May 25th, 1951.

Mr. Benjamin Fukunaga,  
Honolulu, T. H.

Dear Mr. Fukunaga:

I have your letter of May 9th, 1951, on hand.

You realize, I am sure, that according to our contract dated October 17, 1950, that when you took up the option stated in Article VI thereof that my note to you in the amount of \$10,000.00 was automatically cancelled.

Because I am desirous of assisting you to dispose of your interest in Hawaiian Amalga-Pave, Limited, in the hope that you can recover a part of your in-

vestment I suggest that the following be agreed to before I can act further:

1. That you agree to sell your 30,000 shares which we understand is the total outstanding stock at this date for a certain fixed price.
2. That the option regarding the purchase of \$10,000.00 of shares of National Amalga-Pave, Inc., at par value held by me be cancelled.
3. That the option regarding the sub-license for Japan be cancelled.

Since you have carried on the negotiations with Standard Steel Corporation yourself, I feel it is better that you continue to negotiate this settlement. Had you not cancelled the plant, I could have assisted you in minimizing the loss thereon by transfer of your paid-up interest therein to one of the licensees of National Amalga-Pave, Inc. However, Standard Steel Corporation has advised National Amalga-Pave, Inc., that you have cancelled the order thereby stopping production of your unit which leaves nothing to sell at this time. I am sorry you took such action before advising me of the same for it now prevents me from helping you in this matter.

As soon as the sales price for Hawaiian Amalga-Pave, Limited, is set please advise me so that I may take immediate action to dispose of it for you.

The fact that I am not morally or financially obligated to do this for you but have offered to do it indicates my good faith.



Very truly yours,

THELMA AKANA HARRISON.

TAH:ip

[Endorsed]: Filed September 25, 1957.

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In the Supreme Court of the Territory of Hawaii,  
October Term, 1958

No. 4046

(L. No. 23326)

[Title of Cause.]

SUPREME COURT CLERK'S CERTIFICATE  
TO CERTIFIED TRANSCRIPT OF REC-  
ORD ON APPEAL TO 9 CCA

I, Leoti V. Krone, deputy clerk of the above-entitled court, hereby certify that all of the documents listed in the Designation of Record on Appeal to the United States Court of Appeals for the Ninth Circuit are the original documents and items filed in the above-entitled court and cause, and that all of said documents and items are attached hereto.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the above court this 8th day of June, 1959.

[Seal]     /s/ LEOTI V. KRONE,  
Clerk.

United States Court of Appeals  
Ninth Circuit

No. 16497

MRS. THELMA R. HARRISON,

Appellant,

vs.

M. R. A., LTD., d/b/a TERRITORIAL  
COLLECTORS,

Appellee.

STATEMENT OF POINTS TO BE  
RELIED UPON ON APPEAL

1. The Supreme Court of Hawaii erred in deciding that an accommodation party to a negotiable instrument is liable to a holder, other than a holder in due course, when the accommodation party received no consideration for her promise and when no person gave value for the note in reliance upon the credit of the accommodation party.

2. The Supreme Court of Hawaii erred in deciding that the case of Yost vs. Morrow (CCA 9th, No. 15,998, decided January 2, 1959) was conclusive of the instant case, it being clear that in Yost vs. Morrow the payee of the note had relied upon the credit of the accommodation party before giving value to the maker whereas in the instant case it is clear that the note was given to record previous advances by the payee to the corporate maker, and not in any way in reliance upon the credit of the accommodation party.

Dated: Honolulu, Hawaii, this 1st day of July, 1959.

/s/ R. G. DODGE,  
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 8, 1959.

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[Endorsed]: No. 16497. United States Court of Appeals for the Ninth Circuit. Mrs. Thelma Akana Harrison, Appellant, vs. M. R. A., Ltd., d/b/a Territorial Collectors, Appellee. Transcript of Record. Appeal from the Supreme Court of the Territory of Hawaii.

Filed and docketed: June 10, 1959.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.